IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.377 OF 2006

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Multimedia Frontiers Ltd. ...Petitioners

v/s.

Niskhalp Investments and Trading Co. Ltd. & Ors. ...Respondents

...

Mr.R.S.Jaisinghani with Nooruddin Dhilla with Ms.C.Afonso i/b M/s.Hariani & Co. for the Petitioners.

Mr.B.B.Saraf with Mr.K.G.Desai i/b Kartikayan & Associates for Respondent No.1.

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CORAM: D.K.DESHMUKH, J.

DATED: 1ST DECEMBER,2006

P.C.:

1. By this petition the Petitioner challenges the award dated 20th March, 2006. By that award the learned arbitrator has directed the Petitioner Multimedia Frontiers Ltd., the Respondent No.2 Shri Ashok Muthana and the Respondent No.3 Samjhota Capital & Savings Fiance Ltd. to pay to the Respondent No.1 Nishkalpa Investment Pvt.Ltd. jointly and severally an amount of Rs.2,29,73,474/- with interest.

2. The facts giving rise to this petition are, that the Petitioner Multimedia Frontiers Ltd., the Respondent No.2 Shri Ashok Muthana and the Respondent No.3 Samjhota Capital & Savings Finance Ltd. entered into an agreement dated 11th October, 2000. As per that agreement, M/s.Samjhota Capital & Savings Finance Ltd. a company incorporated under the Companies Act sold 3,40,000 equity shares of the

Petitioner company at a price of Rs.30 per share. It was also agreed that the Respondent No.1 would be allotted 170,000 new equity shares of the Petitioner company in favour of the Respondent No.1 at the price of Rs.30 per share. It was also agreed between the parties that within a period of one year from the date of the agreement the shares of the Petitioner will be listed on the stock exchange. It was agreed that if the shares of the Petitioners company are not listed on the stock exchange within one year, the Respondent No.1-company could have an option to sell the shares to Respondent No.2 Shri Ashok Muthana, who would be under an obligation to buy those shares at the rate of Rs.30 per share and he will also be liable to pay interest on the amount calculated at the rate of 18% p.a. from the date of the agreement till the date of exercise of option by the Respondent No.1. The option was to be exercised by the Respondent No.1 within a period of six months from the date of the expiry of the period of one year from the date of the agreement. Respondent No.2 Mr.Muthana had given a cheque in the amount of Rs.1,80,54,000/-, which was post-dated cheque, in favour of the Respondent No.1. Respondent No.3 Samjhota Finance Ltd. had also executed a demand

draft in the amount of Rs.1,53,00,000/- in favour of the Respondent No.1 as a collateral security for committing obligation by the Respondent No.2 by purchase of shares. On 20th November, 2000, on behalf of the Petitioner a letter was written to the Respondent No.1 where the agreement dated 11th October, 2000 was referred to and it was stated that in the event the Respondent No.2 fails to discharge his liability for any reason, then the Petitioner/company will be liable to discharge the same by treating the entire liability of Rs.1,80,50,000/- as intercorporate deposit and post-dated cheques dated 11th October, 2001 for that amount was issued to discharge the liability in the event of default committed by Mr.Ashok Muthani-Respondent No.2.

3. Admitted position is that the period of one year during which the shares were to be listed on the stock exchange came to an end on 10-10-2001. On 11-10-2001 the Respondent No.1 put the cheque given by the Petitioner company in the bank for realisation. The cheque was dishonoured. On 7-11-2001 the cheque given by the Respondent No.2 was put in the bank, that was also dishonoured. Notices

were given to both the Petitioner and the Respondent No.2 in relation to dishonour of the cheques by letter dated 6-12-2001. In view of the dishonour of both the cheques the Petitioner and the Respondent No.2 were called upon to pay the amount of Rs.1,85,08,070/-. Payment was not made pursuant to that notice. Therefore, arbitration clause was invoked and the proceedings before the learned arbitrator commenced.

4. The learned Counsel appearing for the Petitioner submits that it was the contention of the Petitioner before the learned arbitrator that the liability of the Respondent No.2 to pay the amount to the Respondent No.1 will arise on the Respondent No.1 exercising their option of selling the shares of the Petitioner company to the Respondent No.2. It is only on failure of the Respondent No.2 to purchase the shares that the cheque given by him could have been put in the bank for realisation and it is only on failure of the Respondent No.2 to make the payment or in the event of the cheque given by him getting dishonoured that the liability of the Petitioner would arise. According to the Petitioner as the Respondent No.1 never offered the shares to the

Respondent No.2, the liability of the Respondent No.2 to pay the amount to the Petitioner never arose and as the liability of the Respondent No.2 never arose, there is no question of the liability of the Petitioner arising under the subsequent agreement dated 20th November, 2000.

5. Because of the pleadings of the Petitioner, issue No.7 was framed by the learned arbitrator to that effect. The learned arbitrator while deciding that issue has said that the letter dated 6th December, 2001 amounts to exercise of option under the agreement by the Respondent No.1. It is submitted by the Petitioner that perusal of the letter dated 6th December, 2001 shows that by no stretch of imagination it can be said that by that letter the option under the agreement has been exercised by the Respondent No.1. It is also submitted that perusal of the award shows that the learned Arbitrator has not considered the submissions that were made before him on behalf of the Petitioner on issue No.7. According to the learned counsel finding recorded by the learned arbitrator on issue No.7 suffers from non application of mind to the relevant aspect of the matter.

6. On behalf of the Respondent No.1, on the other hand, it is submitted that putting post-dated cheques given by the Respondent No.2 in Bank itself amounts to exercise of option by the Respondent No.1. It is submitted that in any event by the letter dated 6th December, 2001, which was written within a period of six months from the date of expiry of period of one year, the Respondent No.2 was called upon to make payment and therefore the learned arbitrator was justified in holding that option has been exercised by the letter dated 6th December, 2001. The learned Counsel submits that in any case it was open to the Respondent No.2 to demand the shares when he was called upon to make payment.

7. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that clauses 3 and 4 of the agreement dated 11th October, 2000 are relevant. They read as under:-

> 3. If the company and the Promoter fail to meet the aforesaid listing obligations within a period of one year for any reason, then at the option of the Investor, the Promoter shall

purchase the said shares and the Purchased shares or the shares that may be issued in lieu of the aforesaid shares by the Merged Company at a price of Rs.30/- per share plus interest on the aforesaid amount calculated at the rate of 18% per annum from the date hereof till the date of the exercise of the option. The option shall be exercisable by the Investor at any time within a period of six months from the date of the expiry of the period of one year within which listing is required to take place as aforesaid.

4. The Promoter shall on the date hereof give a post dated cheque of a sum of Rs.1,80,54,000/- (Rupees One Crore Eighty Lacs Fifty Four Thousand only) in favour of the Investor and Samjhota shall issue a Demand Promissory note for Rs.1,53,00,000/- (Rupees One Crore Fifty Three Lacs only) drawn in favour of the Investor as a collateral security for meeting their obligations under clause 3.

8. Perusal of the above quoted clauses shows that

obligation is cast on the Petitioner and the Respondent No.2 to have the shares listed on stock exchange within a period of one year from 11-10-2000. In the event of the shares not being listed on the stock exchange within a period of one year, the Respondent No.1 was to exercise the option. The option to be exercised by the Respondent No.1 was either to continue to retain the shares or to sell the shares to the Respondent No.2. It is also clear that if the Respondent No.1 decided to sell the shares to the Respondent No.2, he was under an obligation to purchase those shares and the price at which he was to purchase the shares was also fixed by the agreement. It is obvious that the option to be exercised by the Respondent No.1 was either to retain the shares or to sell them. The option of selling the shares to the Respondent No.2 can be said to be exercised only if the Respondent No.1 offers the shares to the Respondent No.2. Obligation of the Respondent No.2 to purchase the shares will arise only when the shares were offered to him for sale. Perusal of clause 4 makes it clear that the post-dated cheque was given by the Respondent No.2 as a collateral security which was to be encashed in the event of his failure to perform the obligation cast

on him by clause (3) of the agreement namely to purchase the shares when they are offered to him at the price mentioned in clause (3). Therefore, in terms of the agreement it was the condition precedent for encashing the cheque given by the Respondent No.2 that the shares are offered to him for purchase and either he declined to purchase or failed to pay the price which is fixed by clause (3) of the agreement. In the present case, admittedly before putting the cheque given by the Respondent No.2 in bank on 7-11-2001, the Respondent No.1 did not offer the shares for purchase to the Respondent No.1. The learned arbitrator had framed issue No.7 in this regard, which read as under:-

> Whether the Claimant exercised the option to sell their shares to Respondent No.2 as stipulated in the Agreement dated 11th October, 2000? If yes, whether the option was legally and validly exercised and Respondent No.2 was bound and liable to purchase the 5,10,000 shares from the Claimant?

9. In the written submission filed on behalf of the Petitioner following submissions were made,

Issue No.7.

1. Under the Agreement dated 11 October 2000 the Claimants were given an option either to retain the shares or to sell the shares to Respondent No.2 in the event that the shares of this Respondent were not listed on the Stock Exchange and/or this Respondent was not amalgamated with a company whose shares were listed on the Stock Exchange within a period of one year from the date of Agreement. This option was to be exercised by the Claimants within a period of six months from the expiry of one year of the date of Agreement.

2. It is submitted that the Claimants did not exercise the option of selling the shares to Respondent No.2. The claimants witness has admitted that he was not aware of whether the option was exercised by the Claimants. In none of the documents which are on record have the Claimants offered to sell the shares to Respondent No.2. Instead of exercising the option sell the shares to Respondent No.2,

what the Claimants did was deposit the cheque purportedly issued by Respondent No.1 in their favour. The said cheque was deposited on 11 October 2001. In November 2000 the Claimants deposited a cheque purported to have been issued by Respondent No.2. It appears, therefore, that the Claimants treated the entire transaction as a loan transaction and not one for purchase of shares. The burden was on the Claimants to prove that they in fact had exercised the option to sell the shares to Respondent No.2. The record shows that the Claimants had failed to discharge this burden. There is no mention on record to show that the Claimants opted to sell the shares to Respondent No.2.

10. Perusal of the above quoted submissions made on behalf of the Petitioner shows that it was their case that in the terms of the agreement it was necessary for the Respondent No.1 to offer the shares for purchase to the Respondent No.2 before putting the cheque into bank for realisation. In the award the learned arbitrator has decided Issue No.7 by making

following observations:-

> The Claimant had exercised its option to sell the shares to Respondent No.2 as stipulated in the Agreement dated 11th October, 2000 by addressing a letter dated 6th December, 2001 through their advocate. By the aforesaid letter the Claimant had informed the Respondent No.2 of the dishonour of the cheque issued by him in favour of the Claimant. By the said letter the Claimant had also informed Respondent No.1 of the dishonour of the cheque issued by it. In view of the failure on the part of the Respondent Nos.1 and 2 to either respondent to the said letter or to make payment of the cheques dishonoured, the Claimant could not have sold the Shares to Respondent No.1. In any event the fact that the Claimant has deposited the cheque of Rs.1,80,54,000 and the same has been returned dishonoured and also the fact that despite notice being issued to the Respondents, the payment has not been done, in my view it amounts to the Claimant having exercised its option. I therefore hold that the Claimant

has exercised the option under the Agreement dated 11th October 2000.

11. Perusal of above quoted observations of the award shows that according to the learned arbitrator the option to offer the shares for purchase to the Respondent No.2 was exercised by the Respondent No.1 by addressing letter dated 6th December, 2001. Therefore, at this stage it becomes necessary to peruse the letter dated 6th December, 2001. Perusal of that letter shows that from paragraphs 1 to 5, the Respondent No.2 narrates the events and refers the terms in the agreement. In paragraph 6 the Respondent No.1 refers to the obligation of the Petitioner and says that the cheque was given by the Petitioner as a collateral security. Then in paragraph 7 the Respondent No.1 states how the cheque given by the Petitioner was put in bank on 11-10-2001 and how it was dishonoured and in paragraph 8 he narrates dishonour of the cheque given by the Respondent No.2. In paragraph 9, the Respondent No.1 states that the amount of Rs.1,85,08,070/- is due and by paragraph 10 the Petitioner and the Respondent No.2 are called upon to make payment. Nowhere in that letter either it is claimed that at any point

previously the shares were offered for purchase by the Respondent No.1 to the Respondent No.2 nor the shares were offered for purchase to the Respondent No.2 by the Respondent No.1 by that letter. Therefore, perusal of the letter dated 6th December, 2001 shows that observations made by the learned arbitrator which are quoted above that the option to sell the shares was exercised by the Respondent No.1 by writing letter dated 6th December, 2001 is factually incorrect. The learned arbitrator has also observed that the dishonour of the cheque given by the Respondent No.2 and the Petitioner amounts to exercise of option by the Respondent No.1. These observations are really beyond the comprehention. The option was to be exercised by the Respondent No.1. I fail to understand how dishonour of the cheque given by the Petitioner and the Respondent No.2 can amount to exercise of option by the Respondent No.1. It is thus clear that the observations made and the finding recorded by the learned arbitrator in this regard suffers from non-application of mind. It is clear that at no point of time shares were offered as contemplated by the agreement by the Respondent No.1 to the Respondent No.2 within the period of six months from

expiry of period of one year from the date of the agreement for purchase of the shares by the Respondent No.2 and therefore in the absence of exercise of option by the Respondent No.1, the liability of the Respondent No.2 to purchase the shares never arises. So far as the liability of the Petitioner is concerned, it arises on default committed by the Respondent No.2. The liability is tried to be fastened on the Petitioner because of the letter dated 20th November, 2000, which document is marked in evidence. That letter reads as under:-

> November 20, 2000
>
> Niskalp Investments & Trading
> Company Ltd.
> Dubash House, 15, .N. Heredia Marg,
> Ballard Estate,
> Mumbai 400 001
>
> Dear Sir,
>
> This is with reference to the agreement dated October 11, 2000 (said agreement) between Mr.A.Muthana, (the promoter), Multimedia Frontiers Ltd. and Samjhota Capital and Savings Finance Pvt.Ltd. Pursuant to the terms and conditions of the said agreement, Mr.A. Muthana has undertaken to discharge the liability of Rs.1,80,54,000/- by issuing post-dated cheque.
>
> We now hereby confirm and assure that in the event of Mr.A.Muthana could not discharge the liability of Rs.1,80,54,000/- for any reason

> whatsoever nature, then we shall be liable to discharge the same by treating the entire liability of Rs.1,80,54,000/- as inter Corporate Deposit. We, therefore, issue a post-dated cheque bearing No.188905 dated October 11, 2001 for Rs.1,80,54,000/- to discharge our liability in the event of default by Mr.A. Muthana.

12. It is clear from this letter that liability of the Petitioner would arise only on failure of the Respondent No.2 to pay the price of the shares offered to him by the Respondent No.1. As the liability of the Respondent No.2 had never arisen, there is no question of his committing any default in discharge of his liability and therefore, there is no question of any liability of the Petitioner arising.

13. In this view of the matter, therefore, in my opinion, the arbitrator was not at all justified in directing the Petitioner to pay the amount to the Respondent No.1.

14. It was contended on behalf of the Petitioner that the arbitration clause which was invoked and the arbitrator was appointed is contained in the agreement dated 11th October, 2000. The liability of the Petitioner, according to the Respondent No.1,

arose because of the letter dated 20th November, 2000. Admittedly, there is no arbitration clause contained in the letter dated 20th November, 2000. It was, therefore, contended that the learned arbitrator has no jurisdiction to make any award on the basis of the agreement dated 20th November, 2000 as that agreement did not contain any arbitration clause.

15. Reliance was placed on various judgments of the Supreme Court under the Arbitration Act, 1940 to contend that the agreement dated 20th November, 2000 does not get incorporated in the agreement dated 11th October, 2000. Reliance was also placed on my judgment in Arbitration Petition No.400 of 1999 in the case of Narain S. Kimatrai v/s. Jayabharat Credit Ltd. and ors. dated 23-1-2002 to the effect that the agreement dated 20th November, 2000 will not get incorporated in the first agreement and therefore, the arbitrator had no jurisdiction to make the award.

16. I have also heard the learned Counsel appearing for both sides in detail on this aspect of the matter. I find that there is considerable substance

in the submissions made on behalf of the Petitioner that if both the agreements are read together, the second agreement will not get incorporate in the first agreement. This aspect of the matter has been considered by the learned arbitrator in the award in detail and he has said that considering that both of the agreements are linked to each other and disputes between the parties have arisen under the first agreement, he has jurisdiction to make the award. In my opinion, though it is possible to say that the arbitration clause in the first agreement does not get incorporated in the second agreement, but it also cannot be said that the view that has been taken by the learned arbitrator in this regard is impossible to be taken considering the documents on record, and therefore, in my opinion, specially because I find that the award has to be set aside for the reasons given above in relation to the finding recorded on issue No.7, I do not propose to disturb the finding recorded by the learned arbitrator on the arbitrability of the claim against the Petitioner.

17. In the result, therefore, petition succeeds and is allowed. The award impugned in the petition in so far as it makes the Petitioner liable is set aside.

No order as to costs.

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